## INDEX


Opinions Below ..... 1
Jurisdiction ..... 2
The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).
Questions Presented ..... 2
Statutes Involved ..... 3
Statement ..... 3
Reasons for Granting the Writ ..... 8
Conclusion ..... 13


## AUTHORITIES CITED

CASES


*Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905) ..... 4
*Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) ..... 11
*United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1946) 12


STATUTES


U.S. Const., Art. I, §§ 8, 9 ..... 11
15 U.S.C. §§ 1, 2 ..... 12
19 U.S.C. § 1333 ..... 6


## APPENDIX


Order Denying Plaintiff Petition ..... 1a
Order Dismissing Action ..... 3a
Order Denying Stay of Proceedings ..... 4a
Opinion of Court of Appeals ..... 5a
Order extending time to file ..... 8a
Complaint ..... 9a
U.S. Const., Art. I, §§ 8, 9 ..... 17a
19 U.S.C. § 1333 ..... 17a
15 U.S.C. §§ 1, 2 ..... 18a

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

NO.

---

EXPORT LIQUOR SALES, INC.
Petitioner

---

vs.

---

AMBEK WAREHOUSE COMPANY, INC.
AND DETROIT & CANADA TUNNEL CORPORATION,
Respondents

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Export Liquor Sales, Inc., petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 11, 1970.

## OPINIONS BELOW

The following orders were issued by the United States District Court for the Eastern District of Michigan on

October 20, 1969. They have not been officially or unofficially reported and appear in the appendix attached hereto as indicated. Order denying plaintiff's petition for preliminary injunction and dissolving restraining order, Appendix, infra p. 1a. Order Dismissing Action, Appendix, infra p. 3a. Order Denying Stay of Proceedings Pending Appeal, Appendix p. 4a.

The Opinion of the United States Court of Appeals for the Sixth Circuit has not been officially or unofficially reported and is printed in the Appendix, infra p. 5a.

## JURISDICTION

The judgment which petitioner is hereby seeking review is the Opinion of the United States Court of Appeals for the Sixth Circuit, entered on May 11, 1970. See Appendix, p. 5a. An Order Granting Petitioner an Extension of Time until October 8, 1970 within which to petition for certiorari was signed by Mr. Justice Black, and entered on August 21, 1970. A copy of this order is printed in the Appendix at p. 8a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether a private corporation which operates a major port facility between the United States and Canada may prohibit access of petitioner and its customers to vital U.S. Customs inspection, which is required by federal law in the duty-free importation of liquor, while permitting such access to the one company which had agreed to share its profits with it.

2. Whether a private corporation which operates a major port facility between the United States and Canada may for its own personal gain so impede the free flow of

foreign commerce as to render it impossible for individuals to have their duty-free export merchandise examined by Customs officials as required by federal law unless such merchandise was purchased from the only company permitted to operate at the port.

3. Whether a duty-free liquor export company which conspires with a private port facility serving a separate geographical area to eliminate all competition in the trade at that port and through similar means and other coercive techniques achieves a virtual monopoly in this industry throughout the country has violated federal anti-trust laws.

## STATUTES INVOLVED

U.S. Const., Art. I, §§ 8, 9.
15 U.S.C. §§ 1, 2.
19 U.S.C. § 1555.

## STATEMENT OF CASE

This action was brought in the United States District Court for the Eastern District of Michigan on October 15, 1963 by your petitioner, Export Liquor Sales, Inc., (hereinafter referred to as "Export") against respondents Ammex Warehouse Company, Inc., (hereinafter referred to as "Ammex") and Detroit & Canada Tunnel Corporation, (hereinafter referred to as "Tunnel".)

The basis of jurisdiction of the court of first instance was 28 U.S.C. § 1331(a) inasmuch as the complaint (printed in the Appendix, infra, p. 9a) charged the defendants-respondents with obstructing plaintiff-petitioner and its customers' access to the United States customs service, with unreasonable interference with the foreign commerce as undertaken by plaintiff, and with violation of federal anti-trust laws prohibiting unreasonable restraint of trade

and monopoly. The relief sought was an injunction against respondents' unlawful interference with plaintiff's business and ordinary and treble damages. A temporary restraining order was granted on October 15, 1968 and a hearing was held on October 25, 1968 on the order to show cause why a preliminary injunction should not issue. In this hearing, the court indicated its intent to deny the preliminary injunction and to dissolve the restraining order. At this point, respondent Tunnel made an *oral motion* to dismiss the complaint for failure to state a claim upon which relief can be granted, which without further argument or briefs was thereupon granted. Appropriate orders were entered October 30, 1968 and the matter was then appealed to the United States Court of Appeals for the Sixth Circuit. This court issued its opinion affirming the decision below on May 11, 1970 which opinion serves as the basis for the instant petition.

This case has erroneously been described by both the district court and the court of appeals as a private antitrust case based upon the exclusive lease arrangement between the Tunnel and Ammex and the consequent unavailability of space on the Tunnel premises for the operation of plaintiff's competitive business. The principal authority cited by both courts is *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905). A claim that the defendants violated the Robinson-Patman Act, 15 U.S.C. §13(d), has since been dropped from the case and is no longer relevant to a discussion of these proceedings.

Petitioner respectfully suggests that the complaint in this case raised far more serious federal issues than the mere refusal of a utility to lease space on its premises for the carrying on of a business inessential to the operation of the utility *qua* utility. Within the allegations of the

complaint is a claim that the obligation of a private utility which operates a major port facility between the United States and Canada is to provide individuals with access to the United States Customs services as required by law and that the Tunnel cannot restrict one individual's access to vital customs services while granting it to a competitor in order to reap an even larger profit from the undertaking. Another claim advanced in the complaint is that a private utility which controls a major international port facility cannot exercise its own discretion to decide which individuals shall and shall not be permitted to engage in the export of merchandise since this restriction amounts to a vast interference with the free flow of foreign commerce which under the Constitution only Congress has the power to regulate. Finally, the complaint charges a conspiracy to restrain trade and a monopoly of the industry which goes far beyond the mere refusal of the Tunnel to lease space to petitioner; it charges respondents with conspiring to eliminate all competition in the duty-free liquor export business, not only at the Tunnel, which in itself represents a substantial geographical market, but also in the various other ports in the State of Michigan and throughout the rest of the country.

The factual details in support of these claims were never brought out and developed before the courts below because the entire case was dismissed on the pleadings on an oral motion before petitioner had an opportunity to present even affidavits and documentary evidence. Thus, not only is petitioner objecting to the decision below on the grounds that it overlooks the principal issues raised in the complaint, but also that it denies petitioner the opportunity to proceed to develop in court either by pretrial methods or by evidence at trial the full substance of its claims.

In view of the above, petitioner's statement of the case will involve a recitation of the facts which petitioner would prove if offered such an opportunity. It includes not only those facts which are specifically alleged in the complaint, but also those facts which are encompassed in the general allegations, sufficient under notice pleading requirements to apprise respondents of the nature of the claims against them.

The facts which underlie petitioner's claims and which petitioner would be prepared to prove at trial are as follows. Petitioner and respondent Ammex are Michigan corporations engaged in the business of selling liquor duty-free to foreign travellers about to leave the United States under the provisions of 19 U.S.C. § 1555, printed in the Appendix, infra, p. 17a. The law requires that merchandise so exported must be taken from bonded warehouses and delivered to customers once they have been committed to foreign travel and inspected there by Customs so that the goods do not enter the domestic stream of commerce. Respondent Tunnel is a Michigan corporation which either owns or leases and operates a tunnel which connects downtown Detroit, Michigan with downtown Windsor, Ontario in Canada. It provides the principal, if not the only means of vehicular travel between these two cities. The Ambassador Bridge, located four or five miles to the west of the Tunnel, connects Detroit with the major Canadian highway No. 401 and leads to Toronto and other cities further East.

The Tunnel has entered into an exclusive arrangement with respondent Ammex providing it with space on the Tunnel premises for delivery and customs inspection of merchandise after the customer has paid his toll and committed himself to foreign travel. The arrangement further provides that the Tunnel will not permit any competitor of

Ammex to obtain the required customs inspection on tunnel premises, thereby guaranteeing Ammex a virtual monopoly over the vital customs inspection service on this major port facility. In return, Ammex has agreed to pay the Tunnel a fixed percentage of its gross sales. Thus, the less competition for Ammex, the greater its sales and the greater the return to the Tunnel under its arrangement.

On October 14, 1968, the Tunnel commenced a trespass action against petitioner in the Wayne County Circuit Court, State of Michigan and obtained a temporary restraining order against Export's trespassing in connection with its liquor business. This restraining order was dissolved by an order of the federal district court in this action, but was later reinstated when the case was dismissed. Petitioner tried to develop other means of carrying on its business near the Tunnel in order to continue a competitive condition but the Customs department ordered it to cease its new operation on the ground that it interfered with traffic. Enforcement of this Customs order has been temporarily enjoined in a separate federal action which presently pends.

The Tunnel has entered into another lucrative arrangement with Chrysler Corporation, making available to the latter a substantial amount of space to store and expedite shipments of parts to its Canadian subsidiaries under special duty provisions applicable to that situation. The space used by Chrysler has been leased to the Tunnel "for Tunnel purposes" by the City of Detroit for a very nominal rent.

The competitive situation in the duty-free liquor export business is as follows. Respondent Ammex and its various affiliates account for virtually all of the business conducted out of the Michigan-Canadian ports and control approximately ninety percent of such business in the entire country.

This monopoly is made possible by the persistent efforts of Ammex and other companies affiliated through common stock ownership and common and interlocking directors to gain exclusive access to customs inspection in all of the major ports in the country, similar to the arrangement it has with the Tunnel, as outlined above. In addition, these companies have threatened major producers of liquor, and suppliers of cigarettes and perfume to discontinue business with them if they should supply any products to any of their competitors. Finally, these companies have attempted to make no-competition agreements with certain possible competitors in exchange for the freedom to operate unrestricted in their own territory. The obviously harmful effect of such a non-competitive situation is demonstrated by the fact that Ammex was forced to drop its prices 20 to 25 percent immediately upon the opening of petitioner Export's business in December, 1968. The effect of the dismissal of this case and the elimination of petitioner from the competitive picture would certainly be an immediate corresponding increase in prices. Continuation of respondents' unrestricted practices would also obviously result in the inability of any other competitor to enter the market at any time in the future.

## REASONS FOR GRANTING THE WRIT

1) Petitioner urges this Court to grant the writ so that it may decide a vital federal question, not effectively reached by the courts below, but very critical to foreign commerce. This issue is whether a private individual can use a natural monopoly position, such as the Tunnel in this case, to discriminate between users with respect to obtaining vital federal government services, such as customs. Respondents contend that the Tunnel functions as a

utility only with respect to non-discriminatory vehicular travel, but not with respect to the availability of customs inspection on articles which travellers seek to take with them.

Such a position is completely untenable. No utility can operate a port facility without making some space available for customs and immigration service. A port requires for its very existence such services so as to permit traffic and merchandise to move in accordance with federal law. As noted above, the Tunnel permits Chrysler Corporation to use special facilities to expedite the shipment of parts to Canada under special customs regulation. Clearly, the Tunnel could not deny other companies permission to use it as a means for exporting comparable items under the same or similar regulations. If the Tunnel had such power, it could conceivably affect the competitive position of all the major manufacturers in this country with subsidiaries in Canada since the Detroit-Windsor port is one of the major access routes between the two countries.

Thus, the question becomes whether the Tunnel, as a utility, can decide that it will permit access to the necessary governmental services for only those kinds of travellers and merchandise which it desires to allow and to refuse access to those individuals or merchandise which it does not wish to use the port. Obviously, the law does not permit private individuals to decide who is entitled to government services and who is not. Such discretion, vested in private individuals and exercised by them for private gain, is intolerable in a civilized society.

2) Petitioner seeks review in order to have this Court decide whether a private corporation having a natural monopoly over a major port facility may forbid the international transaction of certain kinds of businesses or may

regulate them so as to insure itself a substantial portion of all business so conducted. The effect on foreign commerce of respondents' actions in denying petitioner the right to export its merchandise through the Detroit-Windsor Tunnel was only obliquely considered by the courts below. Their decisions rested primarily upon *Donovan v. Pennsylvania Co., supra*, which held that exclusive contracts between railroad stations and a taxicab company providing for the transportation of interstate passengers from one station to another does not in itself violate the federal anti-trust laws. This decision did not deal with a situation where a federally regulated business, such as bonded warehouses and duty-free exports, requires for its very existence certain minimal customs facilities at the port of exit.

The effect on interstate commerce of the *Donovan* decision is negligible inasmuch as other cab companies may presumably continue to operate in the same community even without the right to transfer passengers from one station to the next. However, in the instant case, the effect on foreign commerce is substantial. No duty-free business may operate at the Tunnel port without access to customs inspection. The issue here is not whether the Tunnel must provide space on its premises for any retail liquor stores which wish to operate there, but rather whether it must provide space for U.S. Customs officials so that foreign travellers wishing to purchase duty-free liquor as permitted by federal law may obtain the necessary customs inspection as they leave the country.

Respondent Tunnel, in its brief to the Court of Appeals, argued that its facilities are not large enough to permit more than one export liquor dealer to obtain the necessary customs inspection on its premises and that additional dealers, including petitioner, create an unreasonable interfer-

ence in the operation of the Tunnel and the flow of traffic. Whether petitioner's business does create such a traffic hazard and whether alternative methods are available to circumvent traffic problems on the Tunnel are questions of *fact* and certainly cannot be decided merely on the pleadings. Petitioner contends that its operation at the Tunnel interferes far less with traffic than that of Ammex and that respondents' real objections is petitioner's threatened competition with Ammex's otherwise insulated monopoly position which by virtue of their agreement with the Tunnel makes the Tunnel *defacto* partner of Ammex since the Tunnel receives a portion of Ammex's *gross* sales. In any event, petitioner contends that it is entitled to have its day in court on the issue of creating an unreasonable interference in the operation of the Tunnel.

Under the Constitution, only Congress has the power to regulate foreign commerce. Art. I, § 8. When the State of New York tried to regulate the carrying on of the duty-free liquor export business from its ports, this Court declared that it had no such authority. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964). If a State cannot regulate or interfere with the free flow of foreign commerce in this area, certainly a private port facility should have no such power to interfere in the way respondent Tunnel is attempting to do here. Furthermore, respondents' contract giving the Tunnel a fixed percentage of Ammex's gross sales amounts in effect to a tax on exports which the Constitution forbids any sovereign, including Congress, to impose. Art. I, § 9. Certainly the authority to operate a private major port facility should not carry with it the unrestrained power to control and regulate who may engage in foreign commerce and in what manner. Such a power vested in a private individual unresponsive

to the public need violates both the letter and the spirit of the Constitution and should be abolished.

3) Petitioner urges this Court to review the decision below because of its resulting impact on the general competitive picture in the duty-free liquor export industry. Petitioner asserts anti-trust violations against respondents based primarily upon 15 U.S.C. §§ 1, 2. These provisions outlaw combinations in restraint of trade and monopolies within the meaning of the Act. The facts which support petitioner's contentions in this respect are outlined above. The Tunnel can be shown to serve a geographical area separate from any other vehicular access from Michigan to Canada. The facts show a conspiracy between the respondents to monopolize all trade in this business through the Tunnel and their success in the virtual elimination of all competition at this particular port and throughout the country.

Even the *Donovan* rule discussed *supra* has been held not to apply to situations where companies conspire to eliminate competition in obtaining exclusive franchises from utilities. In *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1946), this Court held that taxicab companies could not agree to refrain from competing with each other in obtaining a railroad station franchise, such as the one approved in *Donovan*. Petitioner contends that a similar situation is involved in this case, that Ammex and its affiliates have agreed not to compete at any of the ports involved and that respondent Tunnel has acceded to Ammex's monopolistic pressure by agreeing to keep petitioner and all other potential competition out of its port facility for a percentage of Ammex's gross sales. Thus, the facts in this case go far beyond the lower court's characterization that the Tunnel's mere refusal to lease

operate a retail liquor store on its premises does not constitute a violation of the anti-trust laws. The effective elimination of all competition through coercive means does constitute such a violation, which petitioner if give a chance would prove at trial.

In conclusion, petitioner urges this Court to grant the writ because the decision below has effectively denied it the opportunity to present proofs in court which would demonstrate respondent Tunnel's discrimination against it with respect to obtaining vital customs inspection on its premises, respondent Tunnel's unreasonable interference with the free flow of commerce at this vital port facility, and finally the virtual elimination of all effective competition in this industry brought about by the joint actions of both respondents. Petitioner contends that the issues involved are very important as they apply to the sensitive operations of all private port facilities and as they affect the entire competitive siutation in this industry. The magnitude of the growth of foreign travel makes a determination of these issues of vital importance to the country.

## CONCLUSION

For the foregoing reasons, petitioner urges this Court to grant the petition for writ of certiorari and to reverse the decision below so that the matter can be set for trial.

Respectfully submitted,
LEBENBOM AND MORGANROTH
By: David Lebenbom
2118 Guardian Building
Detroit, Michigan 48226
313-963-6666
Attorneys for Petitioner,
Export Liquor Sales, Inc.



U.S. District Court, Eastern District, Mich.

## ORDER DENYING PLAINTIFF'S PETITION FOR PRELIMINARY INJUNCTION AND DISSOLVING RESTRAINING ORDER

At a session of said Court held in the Federal Building, Detroit, Michigan on the 30th day of October, 1968.

PRESENT: HONORABLE FRED W. KAESS, District Judge

This cause having come on to be heard on an Order of this Court entered October 15, 1968 directing Defendant Detroit & Canada Tunnel Corporation to Show Cause Why A Preliminary Injunction Should Not Issue enjoining said Defendant from proceeding in any manner with its action number 119900 pending in the Wayne County Circuit Court against Plaintiff, Export Liquor Sales, Inc., and after reviewing the file in this action, and after reading and considering the briefs filed by the parties, and after hearing and considering oral arguments by the parties, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that Plaintiff's petition for a preliminary injunction against Defendant Detroit & Canada Tunnel Corporation enjoining said Defendant from proceeding in any manner with its cause of action in the Wayne County Circuit Court being Civil Action Number 119900 entitled Detroit & Canada Tunnel Corporation, Plaintiff v. Export Liquor Sales, Inc., Defendant, be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the Temporary Restraining Order issued by this Court on October 15, 1968, restraining Defendant Detroit & Canada Tunnel Corporation from proceeding in any manner whatsoever

with its cause of action in the Wayne County Circuit Court Civil Action Number 119900, be, and the same hereby is, dissolved.

IT IS FURTHER ORDERED that the Order of this Court entered on October 15, 1968 dissolving the Temporary Restraining Order issued by the Wayne County Circuit Court, Honorable Joseph G. Rashid, presiding, on October 14, 1968, be, and the same hereby is, rescinded and vacated.

/s/ Fred W. Kaess
District Judge

Approved as to form:
/s/ Timothy Wittlinger
Attorney for Defendant
/s/ Fred Morganroth
Attorney for Plaintiff

**ORDER DISMISSING ACTION (D.C. Mich. E.D.)**

**At a session of said Court held in the Federal Building, Detroit, Michigan, this 30th day of October, 1968.**

**PRESENT: HONORABLE FRED W. KAESS, District Judge**

**This cause having come on to be heard on Defendant Detroit & Canada Tunnel Corporation's motion to dismiss for failure of Plaintiff's complaint to state a cause of action upon which relief can be granted, and after reviewing the file in this action, and after reading and considering the briefs filed by the parties, and after hearing and considering oral argument by the parties, this Court being fully advised in the premises,**

**IT IS HEREBY ORDERED that this action be, and the same hereby is, dismissed, without costs to either party, for the reason that Plaintiff's Complaint does not state a claim upon which relief can be granted.**

**/s/ Fred W. Kaess**
**District Judge**

**Approved as to form:**
**/s/ Fred Morganroth**
**Attorney for Plaintiff**
**/s/ Timothy Wittlinger**
**Attorney for Defendant**

## ORDER DENYING STAY OF PROCEEDINGS PENDING APPEAL

At a session of said Court held at the Federal Building, Detroit, Michigan, this 30th day of October, 1968.

PRESENT: HONORABLE FRED W. KAESS, District Judge

A motion having been made by the Plaintiff for a stay of proceedings, pending appeal from this Court's order denying an Order to Show Cause why the State Court proceedings should not be enjoined and for dismissal of Plaintiff's Complaint, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that Plaintiff's motion for a stay of proceedings, pending appeal from this Court's order denying Order to Show Cause for a permanent injunction enjoining the Defendants from proceeding in the Wayne County Circuit Court, pending appeal, be and hereby is denied, and

IT IS FURTHER ORDERED that pursuant to the provisions of Title 28, U.S.C. § 1292(b), that the Court's denial of Plaintiff's Order to Show Cause involves a controlling question of federal law to which there is a substantial ground for difference of opinion and that an immediate appeal from said order may materially advance the ultimate termination of the issue.

/s/ Fred W. Kaess
District Judge

Approved as to form:
LEBENBOM, HANDLER, BRODY & MORGANROTH
By /s/ Fred Morganroth
Attorneys for Plaintiff
HILL, LEWIS, ADAMS & GOODRICH

**By /s/ Timothy D. Wittlinger**
**Attorneys for Defendants**

• • •

**Opinion of Court of Appeals**
**Decided and Filed May 11, 1970.**
**Before: PHILLIPS, Chief Judge; McCREE and EDWARDS, Circuit Judges.**

**McCREE, Circuit Judge.** This is an appeal from the dismissal of a private antitrust suit for failure to state a claim on which relief could be granted. The facts are not in dispute. Appellee Detroit & Canada Tunnel Corporation owns or leases a vehicular tunnel between Detroit, Michigan, and Windsor, Ontario, and other property adjacent to the tunnel entrance in Detroit. Appellee Ammex Warehouse Company carries on an export liquor business. It sells liquor in the United States to persons about to enter Canada, and delivers the liquor to them on premises leased from the Tunnel Corporation beyond the toll gates at a location where travellers are irrevocably committed to foreign travel. Ammex has an exclusive contract with the Tunnel Corporation to conduct this business on tunnel premises, and for this privilege pays the Tunnel Corporation a certain percentage of its total sales. If liquor is exported in this manner, it may be purchased free of certain taxes and duties, and thus at a considerably lower price than in retail outlets in Michigan or Ontario.

Appellant Export Liquor Sales, Inc., apparently recognized the lucrative nature of this business and decided to compete with Ammex. Unable to acquire a tunnel location because of Ammex's exclusive lease, appellant secured premises near the tunnel entrance where it sold and issued receipts for liquor. Hired runners entered tunnel premises

and delivered the merchandise to purchasers after they had paid the toll and committed themselves to cross the international boundary.

The Tunnel Corporation objected to these activities and brought suit in the Wayne County Circuit Court in Detroit to enjoin Export Liquor from trespassing on its premises. That court issued a temporary restraining order, and Export Liquor filed this suit in the United States District Court for damages and injunctive relief because of alleged antitrust violations.

We consider, first, appellant's contention that appellees have violated the Robinson-Patman Act, 15 U.S.C. § 13(d), because the Tunnel Corporation has in effect given Ammex a monopoly of export liquor sales in the Detroit-Windsor Tunnel. It is doubtless true that monopoly is a consequence of the Tunnel Corporation-Ammex lease, but the Robinson-Patman Act prohibits only price discrimination in the sale of goods. The Act is not concerned with what we have here (assuming arguendo that the exclusive lease amounts to price discrimination), a lease of realty. See *Gaylord Shops, Inc.* v. *Pittsburgh Miracle Mile Town & County Shopping Center*, 219 F.Supp. 400 (W.D. Pa. 1963). We agree that the Robinson-Patman count was properly dismissed.

Appellant also alleges that appellees' conduct violates the Sherman Act, 15 U.S.C. §§ 1, 2. This contention is untenable in view of *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905), in which the Supreme Court recognized the right of a railroad company operating a terminal to have an exclusive arrangement with one taxi company on its premises. In other words, a corporation with control over a unique location essential to the conduct of a certain kind of business can lease a part of that location to one entity and thereby

give it an effective monopoly without violating the Sherman Act.

• • •

Despite its age, *Donovan* enjoys continued vitality. See *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52, 56 (1st Cir. 1966); *Parmalee Transp. Co.* v. *Keeshin*, 292 F.2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, reh. denied, 368 U.S. 972 (1962); *Friend* v. *Lee*, 221 F.2d 96, 100 n. 5 (D.C. Cir. 1955); *cf. Savon Gas Stations #6, Inc.* v. *Shell Oil Co.*, 309 F.2d 306 (4th Cir. 1962), cert. denied, 372 U.S. 911 (1963). And of course the Robinson-Patman Act did not reverse the *Donovan* rule insofar as it is relevant here, because, as we have seen, the Act has no application to this case.

Under the *Donovan* holding, the Tunnel Corporation may lease to Ammex and refuse to lease to Export Liquor space on the tunnel premises, so long as it does not discriminate among users of the utility *qua* utility, *i.e.*, motorists driving through the tunnel. We agree with the District Court that appellant's complaint does not state a cause of action under the Sherman Act.

The decision of the District Court is affirmed.

*Order of Supreme Court of the United States*

• • •

**ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

**UPON CONSIDERATION** of the application of counsel for petitioner(s),

**IT IS ORDERED** that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 8, 1970.

/s/ Hugo L. Black
Associate Justice of the Supreme Court of the United States

Dated this 21th day of August, 1970.

• • •

## COMPLAINT (D.C. Mich. E.D.)
## (Filed October 15, 1968)

Now comes EXPORT LIQUOR SALES, INC., a Michigan corporation, by its attorneys, LEBENBOM, HANDLER, BRODY & MORGANROTH, and for its complaint against Defendants states as follows:

1. This Complaint is filed and these proceedings are instituted against the above-named Defendants under Section 15 and 26 of Title 15, U.S.C., being part of the Act of Congress on July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraint and monopolies," as amended, commonly known as the Sherman Act and the Clayton Act. The purpose of this action is to recover damages against the above-named Defendants for injuring Plaintiff in its business of the retail sale of liquor for export in the City of Detroit, County of Wayne, State of Michigan, which injury proximately resulted from the Defendants' violations of the Anti-Trust Laws of the United States; and to restrain and enjoin the Defendants from continuing the illegal monopoly and the combination conspiracies and contracts in restraint of Plaintiff's trade and commerce.

2. The business of the export sale of alcoholic beverages at retail and the business of the operation of a tunnel facility between the United States and Canada are within or directly affect trade and commerce among the several states and the United States and Canada. In the course of the retail sale of alcoholic beverages for export, a constant and continuous stream of trade and commerce exists between the states and foreign countries, consisting of solicitation and sale of alcoholic beverages to travelers abroad for use in foreign countries. The business of the operation of a tunnel between the United States and Canada

by its nature consists of the operation of business of trade and commerce between the United States and a foreign country.

3. The Plaintiff, EXPORT LIQUOR SALES, INC., is a Michigan corporation with its principal place of business in the City of Detroit, County of Wayne, State of Michigan. Plaintiff operates, and has since September 21, 1965, operated a retail liquor sales facility at or near the vicinity of Defendant's tunnel facility into Canada.

4. Defendant AMMEX WAREHOUSE COMPANY, INC. is, and at all times herein mentioned is, a corporation organized and existing under the laws of the State of Michigan and engaged in the business of the retail sale of alcoholic beverages to travellers from the United States to Canada and other foreign countries, with its retail outlet located directly on Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility.

5. Defendant DETROIT & CANADA TUNNEL CORPORATION is, and at all times herein mentioned is, a corporation organized and existing under the laws of the State of Michigan, and is engaged in providing tunnel facilities between the United States and Canada and, in addition thereto, in the rental of facilities from commercial establishments for the purpose of sale of goods and/or services to travellers travelling abroad. That the said Defendant DETROIT & CANADA TUNNEL CORPORATION has and maintains an exclusive license, agreement, franchise and monopoly for the operation of a tunnel facility between the United States and Canada from the City of Detroit to the Country of Canada.

6. Beginning at an exact date unknown to Plaintiff, and continuing uninterrupted for years thereafter up to and including the date of the filing of this Complaint, the

Defendants, well knowing the facts herein alleged, have restrained trade and commerce in the interstate and foreign distribution of alcoholic beverages, by contracting, combining and conspiring with each other and each Defendant corporation within itself by and through its officers and employees in restraint of such trade and commerce, contrary to Sections 1, 2 and 13 of the Act of Congress, commonly known as the Sherman Act (15 U.S.C.A., Sections 1, 2 and 13) and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented and prohibited Plaintiff from the sale of alcoholic beverages at retail to foreign travellers. Such combination, conspiracy and contract tend to and do actually restrain and monopolize interstate and foreign commerce in the sale of alcoholic beverages at retail for foreign consumption. More particularly, Defendants have done and are continuing to do the following acts:

A. Arbitrarily, unfairly and wrongfully refusing to permit the Plaintiff access to the United State Customs Officers on the tunnel property, refusing to permit Plaintiff or its merchandise to come on the tunnel property, which is a violation of their rights as citizens since said tunnel is used for interstate commerce, and even refusing to permit a representative of the Plaintiff to accompany a customer in the customer's vehicle through customs.

B. Refusing to rent or make available to Plaintiff like facilities of Defendant DETROIT & CANADA TUNNEL CORPORATION's property at a similar charge as is made to Defendant AMMEX WAREHOUSE COMPANY, INC., and thus endeavoring to monopolize the business of the retail sale of alcoholic beverages to travellers abroad by and through Defendant DETROIT & CANADA TUNNEL CORPORATION's facility.

C. Conspiring and agreeing between themselves to distribute a portion of the proceeds of the Defendant AMMEX WAREHOUSE COMPANY, INC. to Defendant DETROIT & CANADA TUNNEL CORPORATION and in order to increase the said sums, which Defendants divide and distribute between themselves, to force Plaintiff to pay additional sums in order to maintain Plaintiff's business operation, and thus force Plaintiff to be non-competitive and requiring Plaintiff to secure facilities of such a nature as to make it impossible for Plaintiff to effectively compete with Defendant AMMEX WAREHOUSE COMPANY, INC.

D. Permitting Defendant AMMEX WAREHOUSE COMPANY, INC. to enjoy a monopolistic position in the operation of a retail liquor facility for sale to travellers abroad.

E. Favoring Defendant AMMEX WAREHOUSE COMPANY, INC. and discriminating against Plaintiff with respect to the terms and use of the Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility for Plaintiff's sole purpose of complying with the statutes and rules and regulations of the United States Customs Office.

F. Prohibiting Plaintiff from the use of the United States Government Custom's Office on the Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility without the payment of a charge for such use.

7. Plaintiff believes and, therefore, alleges that Defendants, in their acts as complained of herein above, did so by agreement.

8. That Plaintiff believes and, therefore, alleges that since it has opened its business facility, the Defendants

have used their position to give clear, preferential terms and conditions to Defendant AMMEX WAREHOUSE COMPANY, INC. which are not offered to the Plaintiff.

9. That Plaintiff at all times herein mentioned has desired to operate its facility on a competitive basis with the Defendant AMMEX WAREHOUSE COMPANY, INC. and has so informed Defendant DETROIT & CANADA TUNNEL CORPORATION.

10. By the reason of the monopoly of the Defendants and of the combinations, and conspiracies and otherwise illegal and wrongful activity and restraint of Defendants as aforesaid, the business of Plaintiff has been seriously impaired, injured, and damaged and Plaintiff has suffered great damage, operating losses, and loss of profits; that the good will, reputation and prestige of Plaintiff has been seriously and irreparably damaged and injured, all to the unfair and wrongful advantage of Defendants. Plaintiff has been compelled and is paying unreasonable and discriminatory fees and has been compelled and is compelled to be located at an inferior facility on unfair and discriminatory terms in the operation of its business to the damage and loss of Plaintiff and to the advantage of Defendants; and Plaintiff is losing patronage and good will and otherwise continues to be threatened with further loss and damage and injury by reason of the Defendants' violation of the Anti-Trust Laws of the United States.

11. Plaintiff's investment in its retail sales operation is dependent upon its location and its cost of operation, as well as its right to the free and untrammeled use of the United States Government facilities located on Defendant DETROIT & CANADA TUNNEL CORPORATION's facility and Plaintiff's operation is being depreciated in value by reason of the acts of Defendants as hereinbefore alleged.

12. Plaintiff's losses to date as the result of the Defendants' violations of the Anti-Trust Laws as aforesaid are in excess of Fifty Thousand ($50,000.00) Dollars. Plaintiff will suffer damages in the future in a sum or sums at this time unknown and when the extent thereof shall be ascertained, Plaintiff will seek leave to amend this Complaint to set forth the amount of said losses.

13. Plaintiff fears and is justly apprehensive that Defendant DETROIT & CANADA TUNNEL CORPORATION will prohibit Plaintiff from the use of the United States Customs office facility located on the tunnel for and in pursuance of his business operation by virtue of the statutes, rules and regulations of the United States and the United States Customs Department, unless said Defendant be restrained by an Order of this Court from so doing during the pendency of this action or until further Order of this Court.

WHEREFORE, Plaintiff prays as follows:

A. That Summons issue to each of the Defendants, commanding each to appear herein and to answer the allegations contained in this Complaint, and to abide by and perform such Orders and decrees as the Court may make in the premises.

B. That Plaintiff receive with interest as damages for the injury to its business the sum of Fifty Thousand ($50,000.00) Dollars, and that said sum be trebled to One Hundred Fifty Thousand ($150,000.00) Dollars, and that the Court award a reasonable attorney fee is accordance with Section 4 of the Clayton Act (15 U.S.C. Section 15) in such cases made and provided.

C. That Defendant DETROIT & CANADA TUNNEL CORPORATION be enjoined and restrained during the pendency of these proceedings from in any manner pro-

hibiting or preventing Plaintiff from the free, continuous and untrammeled use of the United States Customs facility located on Defendant DETROIT & CANADA TUNNEL CORPORATION's tunnel facility and that it be restrained during these proceedings and until further order of this Court from attempting to make any charge therefor.

D. That Defendants, and each of them, be permanently enjoined and restrained from each and every one of the unlawful practices alleged in Plaintiff's Complaint.

E. That the aforesaid combination and conspiracy, contracts, agreements, arrangements, and understanding in restraint of interstate trade and commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate trade and commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements and understanding and practices alleged in this Complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

F. That the Court adjudge and decree that the Defendants have combined and conspired to restrain unreasonably and have conspired to monopolize, attempted to monopolize and have monopolized the interstate trade and commerce in the retail sale of alcoholic beverages to travelers for use abroad in violation of Section 1 and 2 of the Sherman Act.

G. The Defendants, and any of their subsidiaries or affiliated companies, their officers, directors, agents and employees and their respective successors, assignees or transferees be enjoined from agreeing, combining, conspiring or contracting with each other or with any other person or corporation whatsoever to restrain, control or eliminate competition among themselves or with others, from restraining in any way and from agreeing on the

prices, terms, or conditions in the retail sale of alcoholic beverages to travellers for use abroad or from conspiring or attempting to monopolize, or monopolizing the interstate trade and commerce herein alleged.

H. That Plaintiff recover its costs herein; and

I. That Plaintiff have such other and further relief as the Court may deem proper.

LEBENBOM, HANDLER, BRODY & MORGANROTH
By /s/ Fred Morganroth
Attorneys for Plaintiff
2118 Guardian Building
Detroit, Michigan 48226
963-6666

Dated: October 15, 1968

## UNITED STATES CONSTITUTION, ART. I

§ 8. The Congress shall have the power . . . to regulate Commerce with foreign Nations.

§ 9. No Tax or Duty shall be laid on Articles exported from any State . . .

**19 U.S.C. § 1555. Bonded Warehouses**

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the

owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse. June 17, 1930, c. 497, Title IV, § 555, 46 Stat. 743.

**15 U.S.C. §§ 1, 2. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in

competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

**15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on convication thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

## AUTHORITIES CITED


| | Page |
|---|---|
| Donovan v. Pennsylvania Co. (1905) 199 U.S. 279; 50 L. ed. 192 | 4, 5 |
| Export Liquor Sales Inc. v. Ammex Warehouse Co. Inc. (1970) 426 F 2d 251 | 3 |
| Helvering v. Minnesota Tea Company (1935) 296 U.S. 378; 80 L. ed. 284 | 5 |
| Terminal Warehouse Co. v. Pennsylvania RR (1935) 297 U.S. 500; 80 L. ed. 827 | 5 |
| U. S. v. Yellow Cab Co. (1946) 332 U.S. 218; 91 L. ed. 2010 | 4 |
| Vaughn v. Atkinson (1962) 369 U.S. 527; 8 L. ed. 2d 88 | 5 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 817

EXPORT LIQUOR SALES, INC.
Petitioner,

vs.

AMMEX WAREHOUSE COMPANY, INC.

and

DETROIT & CANADA TUNNEL CORPORATION,
Respondents.

## RESPONDENT AMMEX WAREHOUSE COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Ammex submits the following in opposition to the certiorari petition:

### QUESTIONS PRESENTED

The questions stated by petitioner bear no resemblance to those which petitioner presented to the Court of Appeals or to the District Court. As phrased this time the

impression is left that petitioner is in some way being impeded from transacting business with Customs officers. What petitioner means is that it thinks it could transact its business more conveniently if it could occupy the location which has been leased to respondent Ammex. In true context with the facts the questions should be stated like this:

1. The Tunnel Company has leased space on its plaza to Ammex to deal in bonded liquor for export. It is not alleged that the Tunnel Company has any more space available which it could lease to petitioner. Petitioner carries on its trade in bonded liquor for export at locations off the Tunnel plaza. Are Ammex and the Tunnel Company thereby in violation of the Sherman or Clayton Acts?

2. More succinct is the statement of petitioner's counsel on the record in the court below:

> "The Court: Isn't the real basic issue here—whether or not the Tunnel Company has the right to give an exclusive franchise or whatever it may be to Ammex?
>
> Mr. Morganroth: Yes, that is the sole issue". (T 21-22).

## COUNTER-STATEMENT OF THE CASE

The Detroit-Canada tunnel has its entrance on a parcel of land in downtown Detroit which is occupied by vehicle approaches and buildings containing tunnel equipment and tunnel offices, with a limited amount of space which is leased for news-stand, cigaret stand, etc., for the convenience of travelers. This includes a small area leased to Ammex, where under the observation of Customs offi-

cials Ammex delivers liquor out of bond to departing travelers. It is not claimed that there is any more space available on the tunnel property which could be leased to petitioner.

The petitioner carries on a similar business by which it sends its in-bond liquor by messenger to the tunnel entrance or inside the tunnel and there makes delivery to departing travelers under the observation of Customs officials. Petitioner's business appears to be a flourishing one. However, there has been friction between petitioner and the Tunnel Company due to petitioner's messengers interfering with traffic and slowing up the movement of cars through the entrance, and by the messengers attempting to do business inside the tunnel without paying for the privilege. The Tunnel Company began a suit in the State court to enjoin disorderly conduct.

Thereupon, Petitioner, a citizen of Michigan, brought suit in the District Court against the Tunnel Company and against Ammex, also citizens of Michigan. Jurisdiction was claimed under the Sherman and Clayton Acts (2a). The lease from the Tunnel Company to Ammex was charged to be in restraint of foreign commerce. The relief sought was to have the lease declared to be illegal, to give the petitioner unrestricted use of the tunnel property, and for treble damages (14a-16a).

On motion to dismiss it was conceded in open court that the sole question was whether the Tunnel's leasing of space to Ammex without leasing similar space to a competitor amounted to a violation of the Federal anti-trust laws (T 21-22). The court resolved this question against petitioner. The Court of Appeals affirmed (*Export Liquor Sales Inc. v. Ammex Warehouse Company, Inc.* (1970) 426 F 2d 251).

## ARGUMENT

### I.

In its petition to this court Export cites the Sherman Act only, seeks to distinguish *Donovan v. Pennsylvania Co.* (1905) 199 U.S. 279 on the facts, and relies on no case except *U.S. v. Yellow Cab Co.* (1946) 332 U.S. 218.

Except that there was no liquor involved, *Donovan* was exactly this case. The interstate carrier furnished space to one taxi-cab company and not to its competitor and was held not to be in violation of the Sherman Act. The Court of Appeals correctly said:

> "Despite its age, *Donovan* enjoys continued vitality. See *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority,* 362 F 2d 52, 56 (1st Cir. 1966); *Parmalee Transp. Co. v. Keeshin,* 292 F 2d 794 (7th Cir. 1961), cert. denied, 368 U.S. 944, reh. denied, 368 U.S. 972 (1962); *Friend v. Lee,* 221 F 2d 96, 100 n. 5 (D.C. Cir. 1955); cf. *Savon Gas Stations #6, Inc. v. Shell Oil Co.,* 309 F 2d 306 (4th Cir. 1962), cert. denied, 372 U.S. 911 (1963)."

So far as concerns the sole question submitted to the court below, therefore, that question has been decided exactly as this court had previously decided it.

Petitioners' *Yellow Cab* case is not in point; it dealt with an agreement between taxi-cab companies not to compete for the business of transportation between two railroad stations. This court pointed out the distinction on the facts and reiterated the *Donovan* rule, saying (332 U.S. 218 at 229):

> "It is true, of course, that exclusive contracts for the transportation service in question are not ille-

> gal (citing *Donovan*). But a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case and it is a conspiracy of that type that runs afoul of the Sherman Act."

The *Yellow Cab* case would be in point here only if it were claimed that the two competing liquor dealers (petitioner and respondent Ammex) were conspiring with each other.

## II.

We now leave the case presented below and pass to the case which petitioner seeks to present here, viz. that because petitioner is obliged to transact its business outside the tunnel precincts it is less convenient for it to obtain necessary Customs supervision. We begin by observing that this court does not usually concern itself with questions which are raised here for the first time:

> *Vaughn v. Atkinson* (1962) 369 U.S. 527 at 531.
> *Helvering v. Minnesota Tea Co.* (1935) 296 U.S. 378 at 380.

However, if the supposed grievance is examined in the clothing with which petitioner would now dress it, it will be seen to be only this: A liquor merchant is annoyed because the Tunnel Company has rented to his competitor certain space which is perhaps more convenient than what he has. This is not the direct interference with commerce which the Federal statutes prohibit:

> *Terminal Warehouse Co. v. Pennsylvania Railroad* (1935) 297 U.S. 500.

The petitioner's sole problem is that he cannot remove untaxed in-bond merchandise from his bonded warehouse

except under the supervision of Customs officials. Petitioner has been able to arrange for such supervision on the street outside the tunnel and has been and now is carrying on its business. It could do so more conveniently, it evidently feels, if it could have the location which Ammex has already rented. Nobody is stopping petitioner from dealing with Customs officials and it is doing so every day.

We urge that the writ of certiorari be denied.

Respectfully submitted,

RICHARD FORD
GERALD C. SIMON
FISCHER, SPRAGUE, FRANKLIN & FORD
*Attorneys for Respondent Ammex Warehouse Company, Inc.*
1100 Commonwealth Building
Detroit, Michigan 48226

Detroit, November 3, 1970.

LIBRARY
SUPREME COURT, U. S.
Supreme Court, U.S.
FILED
NOV 7 1970
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 817

EXPORT LIQUOR SALES, INC.
Petitioner,

vs.

AMMEX WAREHOUSE COMPANY, INC.

and

DETROIT & CANADA TUNNEL CORPORATION,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD T. GOODRICH
ELLIOTT H. PHILLIPS
TIMOTHY D. WITTLINGER
Attorneys for Respondent, Detroit & Canada Tunnel Corporation
3700 Penobscot Building
Detroit, Michigan 48226
313-962-6485

HILL, LEWIS, ADAMS, GOODRICH & TAIT
Detroit, Michigan
Of Counsel

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
WO. 2-8745—WO. 2-8732

## INDEX


| | Page |
|---|---|
| Opinions and Orders Below | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Counter-Statement of the Case | 3 |
| Reasons for Denying the Writ | 7 |
| Conclusion | 17 |
| Appendix: | |
| Opinion of the U.S. District Court, Eastern District of Michigan | 1b |
| Docket Entries in District Court, Eastern District of Michigan | 6b |
| Petitioner's Petition for Order to Show Cause and Temporary Restraining Order | 7b |
| Order to Show Cause and Temporary Restraining Order | 10b |
| Complaint in State Court and Annexed Affidavits | 12b |
| Order to Show Cause and Temporary Restraining Order Entered by State Court | 21b |

## AUTHORITIES CITED


| Cases | Page |
|---|---|
| Bingman v. Duluth, South Shore & Atlantic R.R. Co., 164 Mich. 328, 130 N.W. 24 (1911) | 16 |
| Donovan v. Pennsylvania Co., 199 U.S. 279 (1905) | 8, 9, 10, 11, 13 |
| Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) | 12 |
| Huron Portland Cement Company v. Public Service Commission, 351 Mich. 235, 88 N.W. 2d 492 (1958) | 15 |
| Mengel Company v. Nashville Paper Products, et al., 221 F. 2d 644 (6th Cir. 1955) | 5 |
| Napman v. People, 19 Mich. 352 (1869) | 16 |
| Nelson v. County of Wayne, 289 Mich. 284, 286 N.W. 617 (1939) | 15 |
| United States v. Yellow Cab Company, 332 U.S. 218 (1947) | 12 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 817

EXPORT LIQUOR SALES, INC.
Petitioner,

vs.

AMMEX WAREHOUSE COMPANY, INC.

and

DETROIT & CANADA TUNNEL CORPORATION,
Respondents.

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Detroit & Canada Tunnel Corporation, one of the Respondents herein, prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied, for the reasons set forth herein.

## OPINIONS AND ORDERS BELOW

Respondent agrees that the orders and the opinion referred to in the petition are material and revelant, but states that the opinion of the United States District Court for the Eastern District of Michigan, Southern Division, per Fred W. Kaess, District Judge, is also material and relevant, and such opinion is reprinted in the Appendix to this brief. (1b)*

## QUESTIONS PRESENTED

Respondent Detroit & Canada Tunnel Corporation believes that the following restatement of the Questions Presented will present a clearer and more concise picture of the real issues before this Court:

1. Did the District Court properly deny Petitioner's petition for a preliminary injunction restraining Respondent Detroit & Canada Tunnel Corporation from proceeding with its state court action?
2. Were the actions of respondents in entering into the agreement under which the Tunnel Corporation granted Annex the exclusive right to deliver export liquor on the Tunnel Corporation's property and the alleged refusal of the Tunnel Corporation to permit petitioner to come onto the Tunnel Corporation's property for the purpose of delivering export liquor to the public a violation of Section 1 or Section 2 of the Sherman Act?

---

*References: Figures followed by the letter a, all in parentheses, refer to the page number of the appendix to the petition for certiorari. Figures followed by the letter b, all in parentheses, refer to the page number of the appendix to this brief.

## STATUTES INVOLVED

15 U.S.C. §§1, 2.

## COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case not only contains much that is argumentative but it includes as statements of fact matters that are not supported by the record, fails to contain "All that is material to the consideration of the questions presented" as required by Section 1(e) or Rule 40, and omits "appropriate references to the appendix" "accompanied by the appropriate page number" as required by section 1(e) of Rule 40 and Section 2 of Rule 40. This disregard of the Rules makes unduly burdensome the task of respondents in "correcting any inaccuracy or ominions in the statement" as provided for in Section 3 of Rule 40.

At the end of the paragraph which commences on page 4 and continues on page 5 of the Petition is the statement that the complaint charges respondents with conspiring "to eliminate all competition in the duty-free liquor export business, not only at the Tunnel * * * but also in the various other ports in the State of Michigan and throughout the rest of the country." There is no such allegation in the complaint (9a-16a) or elsewhere in the record and if there were it would be patently untrue because the Tunnel Corporation has no interest in any other "port" in the country or in any export liquor business at such port. The same thing is true of the paragraph that starts on the bottom of page 7 and continues on page 8.

In the last complete paragraph on page 7 of the petition reference is made to "another lucrative arrangement with

Chrysler Corporation." Again there is nothing in the record to support this statement but even if there were it would not be of importance because any arrangements made with Chrysler Corporation as a shipper to facilitate shipments of its products to Canada would have no bearing on petitioner's right to use the Tunnel Company's property as a public market place for its products.

In the first complete paragraph on page 7 of the Petition is the statement that the Tunnel Corporation commenced a trespass action in a state court of Michigan and obtained a temporary restraining order against petitioner's "trespassing" in connection with its liquor business; that the restraining order was dissolved by the District Court in this case but was later reinstated when the case was dismissed. There is no elaboration of these statements elsewhere in the Petition and Petitioner's appendix contains nothing with respect thereto except the order of the District Court denying petitioner's petition for preliminary injunction and rescinding its order "dissolving" the state court order (1a-2a) and the Opinion of the Court of Appeals (5a-7a). The complaint in this cause made no mention of the state court action (9a-16a). To supply these deficiencies we incorporate in the appendix to this brief the following, all of which were included in the joint appendix filed with the Court of Appeals:

Docket Entries in the District Court (6b).

Petitioner's Petition for Order to Show Cause and Temporary Restraining Order, filed simultaneously with the filing of the Complaint in this cause (7b).

Order to Show Cause and Temporary Restraining Order entered in the District Court in this cause which among other things "dissolved" the temporary restraining order entered in the State Court (10b).

The Complaint filed in the State Court action and the supporting affidavits annexed thereto (12b).

The Order to Show Cause and Temporary restraining Order entered in the State Court which restrained petitioner from trespassing on the Tunnel Corporation property, from interfering with the collection of tolls at the Tunnel, and from causing congestion and traffic hazards on the Tunnel property (21b).

It may be argued that since the complaint in this cause made no mention of the state court litigation these documents may not be considered in passing on the order dismissing the complaint. However a sworn petition filed by a plaintiff simultaneously with and to implement an unsworn complaint should certainly be treated as a part of the complaint for the purpose of testing its sufficiency and since the Petition for Temporary Restraining Order filed in this cause purported to recite the contents of the complaint filed and temporary restraining order issued in the state court those documents themselves may be presented and control as to their contents. *Mengel Company v. Nashville Paper Products, et al.*, 221 F. 2d 644 (6th Cir. 1955). Be that as it may, these documents can certainly be considered in passing on the District Court's order denying petitioner's petition for preliminary injunction.

In early October, 1953, Petitioner began operations at the Detroit & Canada Tunnel, said operations being aimed at soliciting and selling "in-bond" liquor (and other merchandise not here material) to travelers going to Canada. Such liquor, if exported by the purchaser, is duty and tax free. In order to meet United States Customs regulations, Petitioner must have one of its employees carry the liquor from its store at the foot of Brush Street to the Tunnel entrance, have the purchase checked by a Cus-

toms Officer, and then delivered to the purchaser waiting in his car. (13b) This maneuvering has caused extreme congestion and confusion at the Tunnel entrance, and has created an extremely dangerous and hazardous problem. Cars were cutting from one lane to another, Petitioner's employees were slipping between traffic, toll collections were interfered with and delayed as liquor was delivered as toll was being collected, and bus and truck traffic was interrupted as purchasers' cars traveled in front of buses or over the truck scales. (13b-14b, 17b, 20b) As Petitioner's business is heaviest when Tunnel traffic is heaviest, problems were compounded. (17b)

Respondent Tunnel instituted an action in the Wayne County Circuit Court for trespass against Petitioner (12b), and obtained a restraining order against Petitioner from carrying on its business in a manner involving trespass on Tunnel property (21b), or in a manner designed to cause confusion, congestion or hazardous traffic conditions. Respondent Tunnel owns or leases the entire entrance to the Tunnel, including the entire right of way of Woodbridge Street east to Mariner's Church, which is located on the northwest corner of the intersection of Woodbridge and Randolph Streets (12b).

Petitioner then filed suit in the United States District Court for the Eastern District of Michigan, Southern Division, alleging violation of the anti-trust laws (9a) and obtained a restraining order from Judge Fred W. Kness "dissolving" the state court injunction and restraining Respondent from proceeding in the state court action (7b). An order to show cause why a preliminary injunction, similar to the restraining order, should not issue was set for October 18, 1968 and adjourned to October 25, 1968. Briefs were filed with the District Court, and oral arguments were heard on the adjourned date. Judge

Kaess denied Petitioner's Motion for Preliminary Injunction, dissolved the Temporary Restraining Order and rescinded his previous order "dissolving" the State Court Restraining Order. Judge Kaess also dismissed the action for failure to state a cause of action. From these actions Petitioner appealed to the Court of Appeals for the Sixth Circuit which affirmed the action of the District Court (5a).

## REASONS FOR DENYING THE WRIT

Petitioner's reasons for granting the writ are somewhat obscure. It does not assert any of the traditional reasons listed in Rule 19. Specifically, it does not contend that the decisions of the Court of Appeals in this case is in conflict with the decision of any other Court of Appeals or with any prior decision of this Court. While the petitioner implies that the case involves matters that have not been decided by this Court it does not specifically so state, and if it did, it would not be correct.

An export liquor store on the Tunnel Corporation property is a service provided by the Tunnel Corporation to its customers. Basically, the question involved in this case is whether the Tunnel Corporation has the right to determine who shall be permitted to come on to its property for the purpose of furnishing this service to the Tunnel Corporation's customers. This, of course, involves the making of a good many business decisions which it is the right of the Tunnel Corporation itself to make. The fact that the Tunnel Corporation derives a profit from the operation of the liquor store as a result of the percentage lease does not bring the case within the purview of the Sherman Act.

Petitioner does not wish to come on plaintiff's property for the purpose of availing itself of the Tunnel Corporation's facilities for the purpose for which they are made available to the public. It wishes to come on plaintiff's property for the purpose of carrying on on that property a competing service to that being offered by the person selected by the owner of that property. He is complaining because of the Tunnel Corporation's refusal to permit him to do so. This is his real and only complaint and this Court should not become confused by petitioner's clothing his argument in the habiliments of a claim for denial of access to the services of customs. Basically, the only reason asserted by petitioner for granting the writ is that the decisions of the two courts below were wrong. That is not usually considered as a sufficient reason for the intervention of this Court and furthermore the assertion of error is without merit. This is not a new question, never before decided by this Court. As the Court of Appeals stated, the question is governed by *Donovan v. Pennsylvania Co.*, 199 U.S. 279 (1905), which case, as stated in the appellate opinion, "enjoys continued vitality." *Donovan v. Pennsylvania Company* was a suit growing out of the operation of the Union Station in Chicago. Pennsylvania Company managed and operated the station which was used as a terminal for its own trains and also as a terminal for the trains of a number of other railroads. In its complaint, plaintiff set forth its efforts for many years to protect incoming and outgoing passengers from extortion and annoyances practiced by railroad hackmen, expressmen, and hotel runners, congregating in its station and noisily soliciting the patronage of passengers, as a result of which it had been compelled in 1894 to enter into an arrangement or contract with one Eighme for the purpose of furnishing carriage and cab service to passengers arriv-

ing at the station, for which the railroad gave Eighme a small piece of ground to use for a carriage stand and Eighme agreed to provide adequate and satisfactory cab service and to charge only rates fixed by a Chicago ordinance. Eighme had been allowed to place an agent in the station to notify passengers that cabs and carriages were available. In 1902 the agreement with Eighme was terminated and a similar arrangement was made with Parmelee, who carried on the business in the same manner (199 U.S. 282-283). Plaintiff's bill alleged that the defendants, who were hack drivers, had conspired to injure its business, alleging that they gathered in numbers of from eight to twenty men at a time in front of the station and entered the station by twos and threes without plaintiff's consent and against its objections and in loud and boisterous voices and manner solicited passengers and baggage for their vehicles, that in so doing they harassed and annoyed passengers and in general made themselves objectionable to the plaintiff and to its passengers and disrupted plaintiff's orderly conduct of its business in the station. (199 U.S. 283-284). Plaintiff was granted a preliminary injunction which, as modified by the Circuit Court of Appeals, restrained defendants and their confederates from entering the station to solicit the business of passenger for cabs, carriages and hotels and from congregating on the sidewalks in front of the station so as to interfere with the ingress and egress of passengers and employees, and defendants appealed. Defendants raised precisely the same questions that petitioner has raised in this case. They challenged the right of plaintiff to grant to Parmelee the exclusive right to solicit business in plaintiff's station, asserting that as a railroad it had a legal obligation to refrain from discrimination and that the railroad's contract with Parmelee created an unlawful monopoly, and

that plaintiff had no right to exclude defendants from the station for the purpose of soliciting business while permitting Parmelee to do so. In its opinion approving the action of the Circuit Court of Appeals, this Court said:

> "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And as incident to ownership it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, *having no business with it*, may make profit to themselves. *Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.*" (199 U.S. 293-294)
>
> • • • • •
>
> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee

Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses —certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord to this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling. The defendants did not have or profess to have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the State, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee Company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations and to hotels or private houses in Chicago. But in a real, substantial, legal sense, *that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor*

> *does it involve an improper use by the railroad company of its property.* That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, *and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company by such use of its property also derived pecuniary profit for itself, that was a matter of no concern to the defendants and gave them no ground of complaint.* (Italics supplied) (199 U.S. 296-297)

The only difference between the Donovan case and the case at bar is that the Donovan case involved the right of a group of hack drivers to enter the plaintiff's station for the purpose of soliciting business while this case involves the right of petitioner to come on the Tunnel Corporation's property for the purpose of selling or delivering its products to the public. While the Donovan case was decided in 1905 it "enjoys continued vitality" as expressed by the Court of Appeals in this case (7a) and is a clear expression by this Court of the right even of a public utility to control the use of its own property. Petitioner has not cited a single case which would lend any support to its contention. *Hostetter v. Idlewild Bon Vogage Liquor Corp.*, 377 U.S. 324 (1964), and *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), cited by Petitioner, are not apposite. The former case dealt exclusively with the extent of permissible state regulation of in-bond liquor operations. That problem is not before us, as the State of Michigan has never attempted to control Petitioner's operations in any way. The latter case deals with a conspiracy between two or more taxicab companies in connection with obtaining an exclusive license with a railroad depot. The District Court complaint of Petitioner does not state facts but conclusions of

law. Nowhere in the complaint does Petitioner allege an agreement or conspiracy between Respondent Ammex Warehouse Company, Inc., and any other in-bond liquor dealer in connection with any negotiation for lease of space at the Tunnel. The complaint specifically states that Petitioner does not even know the date of the Ammex-Tunnel lease (paragraph 6); no allegation of illegal actions between Ammex and its competitors in connection with obtaining that lease is claimed. The *Yellow Cab Co.* case specifically states that exclusive contracts between private companies and public utilities are permissible, citing *Donovan* (332 U.S. at 229).

The real goal of Petitioner is a private storage and/or delivery point on Tunnel property. While it is not shown by the record, and can be considered only in connection with the court's denial of the preliminary injunction, continuously for the past year, and today, Petitioner is operating at the Tunnel, and has access to Customs Inspection, though restricted from coming onto Tunnel property. The Customs officer now performing inspections for Petitioner, and whose salary is paid by Petitioner, is actually stationed on Respondent Tunnel's own property, as Respondent Tunnel has assumed that the state trespass injunction cannot run to a United States Customs officer. If the Tunnel should be required to permit a number of vendors, taxi-cab companies, hawkers, or other businessmen to set up shop on the private property of the Tunnel, (and such property is "private" with respect to those of the general public who come there for purposes other than transportation, *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 294 (1905)), then there would be no room for the general public who come to use the Tunnel for its public purpose, in this case transportation to Canada. The primary function of Respondent Tunnel is transportation to Can-

ada, and it has an obligation to restrict incidental activities, permitting only those which do not hamper the primary function of the utility.

Export Liquor Sales, Inc. is not using and does not wish to use Tunnel property for transportation and does not need to have a delivery point on Tunnel property in order to conduct its business, as it has demonstrated by remaining in business after it was forbidden to come onto Tunnel property. Petitioner seeks to trespass on Tunnel property for purposes of economic gain to itself. The Tunnel is not discriminating in any manner against those members of the public who are using the Tunnel for transportation purposes. No commuter or other Tunnel user is complaining of any discrimination. In fact, allowing Petitioner here to move its operation onto Tunnel property will result in a decrease in efficient service to the general public.

Respondent asks this Court to consider not only the operations of Petitioner, but also those of the third and fourth export liquor sellers, who are waiting to institute similar operations. How will the Tunnel be able to provide proper service to its passengers, as it is required to do by law, if it must contend with several liquor sellers and the confusion, congestion, and traffic hazards they maintain?

The situation is somewhat analogous to a restaurant or other concession at Washington National Airport. If any number of concessions were permitted at the airport, without limit, this would hamper the efficient servicing and subject the airport to justifiable criticism. If two, or three, or even more liquor sellers were permitted to carry on their trade on Tunnel property, which is crowded already, there would be a constant interference with fare-paying Tunnel passengers.

Of prime importance is the tremendous safety problem created by Petitioner's operations. That problem was the principal basis for Respondent's action in the Michigan State Court. The Tunnel has an obligation to prevent congestion and traffic hazards at the Tunnel entrance, and is attempting to fulfill that duty.

The law in Michigan follows the same philosophy as the Federal law. The modern public utility is commonly understood as undertaking to render its particular service within a defined area or territory. Upon like reasoning, service is not required in areas beyond the limits to which the general proffer extends, even though for other purposes a line has been extended into such territory. In *Huron Portland Cement Company v. Public Service Commission*, 351 Mich. 255, 88 N.W. 2d 492 (1958), Consumers Power Company was not required to furnish electrical service to Plaintiff cement company because the power company never proffered to serve that area. Respondent Tunnel has never proffered to render general service to export liquor dealers, and such dealers are not part of the general public to which the Tunnel undertakes to provide service. Another Michigan case on point is *Nelson v. County of Wayne*, 289 Mich. 284, 286 N.W. 617 (1939). In the *Nelson* case, a municipally owned water system extended a line beyond city limits for the purpose of supplying water to a county institution. A general service to the public was not proffered, nor did the line have adequate capacity to supply the area. A few private residents were permitted to tap, however. Under these circumstances the Michigan Supreme Court held that the water company could not be required to permit other private citizens the opportunity to tap. Here the Tunnel was created to provide international transportation to auto and bus passengers. It did permit one private company to lease space for the purpose of carrying on an export

liquor business. Its facilities are not large enough nor extensive enough to permit more than one such company to engage in this business. The facts are identical to the facts in the *Nelson* case, and the law of that case should be applied. The Tunnel cannot be required to extend its facilities and services to other commercial companies, especially when the furnishing of such services is not the primary aim of the Tunnel. Reiterating what was said above, as between the Tunnel and companies which do not use the Tunnel's transportation services, the Tunnel's property is like private property and should be dealt with as such.

Another Michigan case on point is *Dingman v. Duluth, South Shore & Atlantic Railway Company*, 164 Mich. 328, 130 N.W. 24 (1911). Plaintiff in this suit alleged that Defendant railroad had a duty to afford equal facilities to all persons operating bus and baggage wagons, soliciting passengers on its trains and at its depots, and that Defendant favored one such bus company and discriminated against all the rest. The Michigan Supreme Court said that the railroad has not only the power, but the obligation, to discriminate, if such discrimination is for the purpose of promotion of passenger convenience. See also *Napman v. People*, 19 Mich. 352 (1869), to the same effect.

Petitioner argues that it has a right to export and that it is prevented from reaching United States Customs. First, Petitioner has not been denied any right, if there be one, to export; it is and has been selling and delivering alcoholic liquors to travelers; it is attempting to carry on a commercial operation on Respondent's property. Second, neither Petitioner nor any other traveler has a right to Customs inspection when leaving the country. Customs inspection is required upon re-entry, but there are no facilities for Customs inspection upon leaving the country. Because Petitioner has chosen to enter a business which re-

quires a Customs officer's supervision (in order to avoid taxes and duties) and which business requires Petitioner to provide and pay the salary of a Customs officer to carry out this supervision, it does not follow that Petitioner has a right to carry on its business on Tunnel property. Petitioner wants to furnish a Customs officer itself at a place where there is normally no Customs inspection, and then argue that it is denied access to this same man, whose salary it pays. This argument is made by Petitioner despite the fact that Petitioner is now and has for some time been conducting its business on public property, without hindrance, and with Customs inspection by a Customs officer based on Tunnel property.

## CONCLUSION

The Tunnel Corporation respectfully asserts that the District Court was correct in denying the petition for a preliminary injunction and in dismissing the complaint; that the Court of Appeals was correct in affirming those orders; that no adequate reason has been shown for seeking the intervention of this Court, and that the petition for the writ of certiorari should be denied.

EDWARD T. GOODRICH
ELLIOTT H. PHILLIPS
TIMOTHY D. WITTLINGER
3700 Penobscot Building
Detroit, Michigan 48226
313-962-6485

*Attorneys for Respondent Detroit & Canada Tunnel Corporation*

HILL, LEWIS, ADAMS, GOODRICH & TAIT
Detroit, Michigan
Of Counsel

## APPENDIX

## OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

(47) The Court: Plaintiff, Export Liquor Sales, commenced this action against Ammex Warehouse and the Detroit & Canada Tunnel Corporation, alleging violation of the Anti-trust laws with particular reference to the Sections as set forth in the Complaint.

It is alleged that the Defendant Tunnel is a public utility and that it has exclusive control of the area involving the area where Ammex is located; that the Tunnel has leased that portion of the property to the Defendant Ammex so that they may carry on a retail store for the sale of liquor and other items. In any event, that as a result of the agreement between the Tunnel and Ammex, together with the actions of each, all competition between any other competitor for the sales of whiskey or liquors and the Defendants would be destroyed. The Plaintiff therefore prays that the Defendants be enjoined from continuing to exclude them from the area and that they be allowed space comparable whereby they may operate a retail store and compete with Ammex.

I suppose one might say parenthetically that, in effect, the Plaintiff wants this Court to make a contract or a lease between the Tunnel and Export, the Plaintiff here, and provide space to conduct a retail establishment or retail distributorship.

(48) This case had its origin in a suit that the Tunnel Company commenced as a trespass suit against Export,

the Plaintiff here, in Wayne Circuit Court, alleging that Export was interfering with the flow of traffic and caused danger to persons and, in effect, interfered with interstate commerce or the orderly flow of traffic through the tunnel. A temporary restraining order was issued by the Circuit Court, restraining Export from trespassing on Tunnel property. This suit was then begun and the temporary restraining order was issued, enjoining the enforcement of the State Court order pending hearing in this Court.

As I see it, the issue before this Court is, as I have indicated, whether or not the Tunnel Company has the right, bearing in mind the Sherman and Clayton Acts, to grant an exclusive, call it franchise, to operate its liquor sales business on the premises, as we understand them to be.

In a matter such as this, I think I must assume the facts as alleged in the Complaint to be true and therefore, and I think it has been agreed that the tunnel is in the nature of a public utility and, as such, it may not discriminate against those who use the tunnel for the purpose designed or designated, and that is as a means of travel from the United States to Canada (49) by automobile, truck and other vehicular travel. Thus, that portion of the tunnel's property designed for public use must be used in such a manner as not to discriminate. In other words, by comparison, it must not be discriminating as to race, as to trucks, buses, automobiles, passengers, whatnot, those activities being engaged in travel through the tunnel. However, this situation is similar to that of railroad stations. It is private property even to the public and all else, but an interest in the benefit of its uses. Those portions of the Tunnel property used for travel are for public use and should be devoted for public use without discrimination. The remaining area owned by the Tunnel and leased to Ammex is not for public use, but is considered private

property and the Court does adopt the language of Donovan versus Pennsylvania, 199 U.S. 279, where it says:

> "It is not bound to so use its property that others, having no business with it, may make profit to themselves. The property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of *transportation.*"

This similarity is likened to the situation involving concessions at Tiger Stadium, the beer and the hot dogs and so on, the City-County Building (50) with its food concessions, railroad stations with their magazine stands, restaurants and so on, and airports where they also have certain concessions. Even to the extent of private airports where they might be giving flying instructions or given an area for flying instructions and so on. I suppose there are many other examples.

There has been no real showing, nor is it alleged that Export, Plaintiff, has been discriminated against in using the tunnel for transportation or that special rates or price fixing existed between the tunnel and the users of the tunnel for transportation, and that is trucking companies, buses and so on.

The Complaint alleges, in substance, that there is a refusal to lease property to Plaintiff, not to deny him use of the tunnel for transportation. Although the tunnel is privately owned, the facilities primarily are designed to benefit the public in providing transportation to and from Canada. To that extent, the property owned by the Tunnel is a benefit to the public and must so operate itself.

Beyond that, it is the ruling of the Court the Tunnel has no duty to either lease property, allow concession stands

to be set up, open a retail store, or to provide any other facility. It is merely to provide means upon which transportation may occur. If the (51) Tunnel desires, it can deny sales outlets to all parties and set up its own retail store, I would suppose. The relief sought has no relation to the purpose for which the tunnel is a public utility and any reference thereto is immaterial or irrelevant.

Going to and from Canada, supplying transportation to that area, is a far cry from selling whiskey. Therefore, the Court holds that the property in question is private property and as such reasonable restrictions may be placed by the Tunnel so that its primary function to the public may be realized. The Tunnel has no duty to lease that or other property to one so that they may derive a benefit unrelated to the purpose of the tunnel.

The purpose of the tunnel is to provide a means of transportation. The purpose of Export, the Plaintiff here, is to set up a retail store. Running a store is as unrelated to driving through a tunnel as this Court can realize. That which makes the tunnel a public utility is that it provides a way of transportation and not because of Ammex. Take away the tunnel and you no longer have a public utility.

The Court bases it opinion on Donovan and Dingman versus Duluth, South Shore & Atlantic Railway Company, 164 Mich. 328, Volume 276 of the United States (52) Reports in the October Term of 1927 of the Supreme Court, where the Court has said:

> "As against those not using it for purposes of transportation"—this was a railroad case—"the railroad is private property in every legal sense, and if any part of its land is capable of use that does not interfere with the discharge of its obligations as a carrier, the railroad has the right to use or permit others so to use it for any lawful purpose."

I am quoting now from the syllabus:

> "A railroad is not bound to permit persons having no business with it to enter its trains, station or grounds to solicit trade or patronage for themselves, and the grant of such privilege to one does not give rise to any duty to others."

I am also referring to A.L.R. 1st 356, where there is comment about the, as I recall, Kalamazoo Hack Company case as not being in line with the majority thinking.

Therefore, the restraining order is and hereby is dissolved, but the case is not dismissed unless I have further motion.

That is it, gentlemen.

• • • • •

(54) Mr. Wittlinger: If it please the Court, at this time, based on your Honor's opinion, we would move to have the Complaint dismissed for failure to show a cause (55) of action. In support of our motion, I would state that if the issue is going to be appealed, the Court of Appeals might be able to best handle both issues at once.

The Court: I will grant that so the issue is right up in there.

Mr. Wittlinger: Thank you, your Honor.

## DOCKET ENTRIES IN DISTRICT COURT

1968

Oct. 15. Complaint, filed—summons issued.

Oct. 15. Petition for order to show cause and temporary restraining order, filed.

Oct. 15. Order to show cause and temporary restraining order, returnable Oct. 19/68, filed and entered.

Oct. 25. Hearing had on order to show cause; Pltf's motion for continuance of restraining order denied. Complaint dismissed.

Oct. 30. Order denying pltf's petition for preliminary injunction and dissolving temporary restraining order, filed and entered.

Oct. 30. Order dismissing action without costs, filed and entered.

Oct. 30. Order denying stay of proceedings pending appeal, filed and entered.

Nov. 6. Pltf's notice of appeal, filed.

Nov. 7. Appeal bond in $250.00, filed. Travelers Indemnity Co., surety.

1969

Jan. 7. Transcript of Oct. 25/68, filed.

## PETITION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

(Filed October 15, 1968)

Your petitioner, Export Liquor Sales, Inc., a Michigan corporation, respectfully shows unto this Honorable Court as follows:

1. That your petitioner has filed a civil action in the above-entitled cause in this Court under the provisions of Section 15 and 26 of Title 15, United States Code, being part of the Act of Congress of the United States of America dated July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraint and monopolies," as amended, commonly known as the Sherman and Clayton Acts.

2. That the purpose of this action is to recover damages and to prevent the Defendants from injuring the Plaintiff in its business of the retail sale of liquor for export which results from the violations of the anti-trust laws of the United States and to restrain and enjoin the Defendants from continuing a monopoly and a combination of conspiracies and contracts in restraint of trade and interstate commerce.

3. That negotiations were held between the Plaintiff and the Defendants, who have refused to permit Plaintiff access to the facilities of the Detroit-Windsor Tunnel at the time that they permit access to Plaintiff's competitor, Defendant Ammex Warehouse Company, Inc.

4. That upon Plaintiff's threatening to bring a civil action in the United States Courts, the Defendant, Detroit & Canada Tunnel Corporation, turned around and brought

an action in the Circuit Court for the County of Wayne against the Plaintiff herein, being Civil Action No. 119900, to enjoin the Plaintiff from using the facilities of the Detroit-Windsor Tunnel, in violation of the rights to free travel in interstate commerce and to permit the free access of the Plaintiff to customs inspection, on the alleged theory that plaintiff was trespassing.

5. That the Detroit & Canada Tunnel Corporation has stated their Complaint in the Wayne County Circuit Court in such a manner as to make it non-removable to the Federal Courts, under the provisions of Title 28, Section 1441 of the United States Code.

6. That in addition, the Defendant, Detroit & Canada Tunnel Corporation, obtained from the Honorable Joseph G. Rashid a temporary injunction restraining the Plaintiff herein from engaging in its business and restraining it from using the inter-state commerce facilities of the Detroit-Windsor Tunnel and, further, restraining it from access to the United States Customs Officers, which, in effect, has put Plaintiff out of business. At the same time, however, the Detroit & Canada Tunnel Corporation has permitted the Defendant, Ammex Warehouse Company, Inc., the use of the facilities and customs officers.

7. That unless an Order to Show Cause issue out of this Court as to why the proceedings in the Wayne County Circuit Court shall not be permanently enjoined; and unless, pending the hearing on said Order to Show Cause, the Detroit & Canada Tunnel Corporation is restrained and enjoined from proceeding in the Wayne County Circuit Court and the temporary injunction issued by the Wayne County Circuit Court is not dissolved insofar as it interfers with the Plaintiff conducting its business in interstate commerce and permitting free access to United States Cus-

toms Officers, your Plaintiff will be irreparably injured, will have to close down his business operations and will be permitting the Defendant, Ammex Warehouse Company, Inc., to enjoy a monopolistic position.

Wherefore, Plaintiff prays:

A. That an Order to Show Cause be issued to the Defendant, Detroit & Canada Tunnel Corporation, as to why it should not be permanently enjoined from proceeding in the Wayne County Circuit Court action following a hearing on said Order to Show Cause.

B. That the Court temporarily enjoin the Detroit & Canada Tunnel Corporation from proceeding in the Wayne County Circuit Court pending the hearing of the Order to Show Cause issued by this Court.

C. Temporarily dissolving the injunction and restraining order issued by the Wayne County Circuit Court pending the hearing on the Order to Show Cause issued by this Court insofar as it interferes with the Plaintiff's right to conduct its business in interstate commerce and to use the Detroit-Widsor Tunnel facilities to a point where it can have access to United States Customs inspections.

D. Such other and further relief as the Plaintiff may be justly entitled.

/s/ James P. Fox

Lebenbom, Handler, Brody &
Morganroth

By Fred Morganroth
Attorneys for Plaintiff
2118 Guardian Building
Detroit, Michigan 48226

State of Michigan,
County of Wayne—ss.

On this 15th day of October, 1968, before me personally appeared the above-named James P. Fox, who, being first duly sworn, deposes and says that he is the President of the Plaintiff, Export Liquor Sales, Inc., and that he has read the foregoing Petition by him subscribed and that the same is true of his own knowledge, except those matters stated therein to be upon information and belief, and as to those matters, he believes them to be true.

Lueva Dixon
Notary Public, Wayne County, Michigan.
My commission expires October 31, 1971.

## ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

At a session of said Court held at the Feder Building, Detroit, Michigan, this 15th day of October, 196[illegible].

Present: Honorable Fred W. Kaess, District Judge.

Upon reading and filing the annexed verified petition of the Plaintiff herein, and upon exhibiting the Civil Complaint filed in this cause, and it further appearing that the Defendant herein, Detroit & Canada Tunnel Corporation, has commenced an action against the Plaintiff in the Circuit Court for the County of Wayne, being case number 119900 and having obtained an injunction and restraining order therein, and it further appearing to the Court that this Court has superior jurisdiction over the matters charged in the Civil Complaint, and that the injunction issued out of the Wayne County Circuit Court is prohibiting the Plaintiff from engaging in interstate commerce

and permitting him access to the offices of the United States Customs Department, and the Court being otherwise fully advised in the premises.

Now, therefore, upon motion of Lebenbom, Handler, Brody & Morganroth, attorneys for the Plaintiff.

It is hereby ordered that Detroit & Canada Tunnel Corporation, a Michigan corporation, be and hereby is ordered to show cause before this Court on the 18th day of October, 1968. at 9:30 o'clock in the forenoon, as to why it should not be permanently enjoined from proceeding with its action number 119900 pending in the Wayne County Circuit Court, and

It is Further Ordered that, pending the hearing on this Order to Show Cause, the Detroit & Canada Tunnel Corporation be and hereby is enjoined and restrained from proceeding in any manner whatsoever with its cause of action in the Wayne County Circuit Court, being number 119900, and

It is Further Ordered that the temporary restraining order issued by the Honorable Joseph G. Rashid, judge of the Wayne County Circuit Court, in Civil Action No. 119900 be and hereby is dissolved, pending the hearing on this Order to Show Cause insofar as it prohibits the Plaintiff, Export Liquor Sales, Inc., from the free access to the United States Customs Officers located at the Detroit-Windsor Tunnel and from the delivery of its merchandise in interstate commerce across said facility to a point sufficient to permit customs inspection, and

It is Further Ordered that since there is an unlikelihood of harm, pending the hearing on this Order to Show Cause, that no bond is required.

s/ Fred W. Kaess
District Judge

This order issued
October 15, 1968, at 1:00 o'clock, P.M.

## COMPLAINT

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

| | |
|---|---|
| Detroit & Canada Tunnel Corporation, a Michigan corporation, Plaintiff, vs. Export Liquor Sales, Inc., a Michigan corporation, Defendant. | No. 119900 |

Comes Now Detroit & Canada Tunnel Corporation, Plaintiff herein, and for its complaint against defendant says as follows:

1. Plaintiff is a Michigan corporation, with a principal office at 151 Atwater Street, Detroit, Michigan.

2. Defendant is a Michigan corporation with an office at 1414 21st Street, Detroit, Michigan.

3. Plaintiff is the owner of the following premises located in the City of Detroit, to wit:

> That property bounded on the North by the South line of Woodbridge Street, on the East by the West line of Randolph Street, on the South by the North line of Atwater Street, and on the West by the East line of vacated Bates Street.

4. Plaintiff is the lessee and entitled to the full use, occupation and possession of the following premises located in the City of Detroit, to wit:

That portion of Woodbridge Street bounded on the North by the South line of the Easterly extension of the Ford Auditorium Plaza, on the East by the Westerly line of Mariners Church extended Southerly, on the South by the North line of Detroit & Canada Tunnel Corporation properties, and on the West by the main East wall of the Ford Auditorium Garage.

5. On Friday, October 11, 1968, Defendant commenced an operation of selling liquor to individuals for export from the United States, said export being by means of Plaintiff's tunnel.

6. Because of United States Customs regulations, it becomes necessary for Defendant to engage in the following operations each time a sale is made:

a) Drive onto Plaintiff's property with oncoming tunnel traffic.

b) Pull to side of road, making U-turn, and park on Plaintiff's property.

c) Leave car, carry liquor to car of purchaser while purchaser's car is waiting to pay toll.

d) Return to car, and drive out of tunnel entrance against oncoming traffic.

7. Said operations constitute a trespass on the property of plaintiff, and defendant's operations threaten a continuing trespass within the meaning of M.S.A. §27A.-2919.

8. Said operations disrupt Plaintiff's operations in the following respects:

a) Delay of tunnel traffic while liquor is handed to purchaser at toll booth.

b) Traffic congestion as defendant's car parks in area reserved for heavy truck traffic and Tunnel Bus operations.

c) Traffic congestion as defendant's car navigates against oncoming traffic as it leaves tunnel area to return to defendant's place of business.

d) Interference with collection of toll at toll booth.

e) Interference with weighing trucks on plaintiff's scale.

f) Causing dangerous traffic hazards in the entrance-way to plaintiff's tunnel.

9. Immediate and irreparable harm will be suffered by plaintiff if defendant's present operations are not enjoined, for the reason that the continuing trespass of defendant causes a situation dangerous to life and property, hampers the efficient operation of the Tunnel, causing delay and backlog of tunnel traffic especially during periods of heavy traffic, and further causing extreme congestion at the Tunnel entrance and a dangerous situation as defendant's employees run across lanes of traffic entering the tunnel, and subjects the Tunnel to liability for any accidents occurring on its poperty as a result of plaintiff's operations.

10. Plaintiff's damages cannot be compensated by a money judgment.

11. Plaintiff has no objection to defendant's operations, if same can be conducted without constituting a continuing trespass on Plaintiff's property or constituting a hindrance to Plaintiff's operations or a situation dangerous to life and property.

12. Plaintiff has requested defendant to cease its trespass on Plaintiff's property, but defendant has refused to comply with this request.

Wherefore, plaintiff requests the following relief:

a) Defendant be required to answer this complaint.

b) Defendant be enjoined from trespassing for commercial purposes on plaintiff's property or property leased to plaintiff; from interfering with the collection of tolls at Plaintiff's tunnel and from causing congestion, traffic hazards, and dangerous traffic conditions on Plaintiff's property or property leased to Plaintiff.

c) Defendant be ordered to show cause why a preliminary injunction should not issue during the pendency of this action enjoining defendant as prayed for in paragraph (b) above.

d) Defendant be temporarily restrained, as prayed for in paragraph (b) above, in the interim pending the hearing on the Order to Show Cause.

e) Plaintiff be awarded costs and reasonable attorney fees.

Detroit & Canada Tunnel Corporation
By /s/ Elliott H. Phillips
Its Secretary and General Counsel

Hill, Lewis, Adams & Goodrich
By /s/ Timothy D. Wittlinger
Attorneys for Plaintiff
3250 Penobscot Building
Detroit, Michigan 48226
962-64855

Dated: October 14, 1968.

State of Michigan,
County of Wayne—ss.

On this 14th day of October, 1968, before me a notary public in and for the county and state aforesaid, personally appeared Elliott H. Phillips, who being by me duly sworn did depose that he is the Secretary and General Counsel of Detroit & Canada Tunnel Corporation. Plaintiff named in the foregoing Complaint, that he signed said Complaint as such, that he has read said Complaint by him subscribed and that the same is true of his own knowledge except as to matters therein stated to be on information or belief and as to those matters he believes the same to be true.

/s/ Margaret George
Notary Public, Wayne County, Michigan.
My Commission expires Nov. 29, 1970.

## AFFIDAVIT OF ARTHUR WALCZAK

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

State of Michigan,
County of Wayne—ss.

Arthur Walczak, being duly sworn, deposes and says:

1. That he is the Traffic Captain of the Detroit & Canada Tunnel Corporation.

2. That he has observed the operation of Defendant's liquor sales.

3. That said operations consist of the following:

a. Defendant's vehicle drives into the area near the toll booths, which area is reserved for heavy truck traffic and Tunnel Buses.

b. Defendant's employee parks in this area, gets out of his vehicle, and runs to the auto carrying the purchaser, and hands the liquor to him, while the purchaser is waiting to pay his toll.

c. Defendant's employee returns to his vehicle and drives out of the entrance plaza, against oncoming traffic.

4. That said operation causes congestion and confusion at the tunnel entrance, in that, among other things, it:

a. Hampers the movement of the heavy truck traffic and tunnel bus traffic to and through the tunnel entrance.

b. Creates a dangerous situation with employees of Defendant running across lanes of traffic entering the tunnel.

c. Creates confusion as Defendant's vehicle leaves the tunnel entrance, against oncoming traffic.

5. That he and other tunnel employees must attempt to reduce the congestion and confusion at the tunnel entrance, and that said congestion is often impossible to control, especially during rush hours.

6. That the volume of Defendant's business is very heavy, especially during weekends and rush hours; for example between 10:30 and 11:30 A.M. on Sunday, October 13, 1968, 23 bottles of liquor was [sic] delivered to waiting cars.

7. That Defendant's operations constitute a continuing trespass on Plaintiff's property, and interferes with the collection of tolls and with traffic.

8. That on Sunday morning, October 13, 1968, the men who deliver liquor to the cars for Defendant repeatedly redirected their customers' cars into the scale lane, thereby forcing other cars in that lane, which had been diricted there by our traffic guards, to take another lane.

9. The same afternoon between 1 and 2 P.M. the following incidents occurred. Two cars, (at different times) came into my lane to pay toll and collect their liquor from Defendant. Since the men from Defendant were late in delivering the liquor to these cars, the customers pulled into our parking lot, having already delayed my traffic lane by waiting at the toll booth for their liquor. When the men from Defendant finally arrived they trespassed on our property to deliver the liquor to these cars.

/s/ Arthur E. Walczak
Traffic Captain

Subscribed and sworn to before me this 14 day of October, 1968.

/s/ Charles J. O'Brien
Notary Public, Wayne County, Michigan.
My commission expires 8-24-72.

## AFFIDAVIT OF RUSSELL BOUCHARD

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

State of Michigan,
County of Wayne—ss.

Russell Bouchard, being duly sworn, deposes and says:

1. That he is the Traffic Supervisor of the Detroit & Canada Tunnel Corporation.

2. That he is responsible for the traffic control entering the tunnel.

3. That he has read the affidavit of Arthur Walczak, and agrees with it in all respects.

4. On more than one occasion with three or four lanes of traffic a car comes down the left hand bus lane from Randolph Street under the impression that they are to pick up their liquor purchase in that lane. The car stops near the tunnel entrance with a bus behind it. It then becomes necessary for the toll collector to halt the traffic in the left hand lane, back the bus up, and direct the car into the right hand lane.

5. The messenger who drives Defendant's vehicle has to cut through traffic to reach the waiting room causing a delay in collecting tolls. He has to repeat the procedure to return to his base of operation.

6. When Defendant's employees have more than one purchase to deliver, it becomes necessary to hand the purchase to the people at the toll booths while the collector

is collecting tolls. During this time Defendant's vehicle is parked in a zone marked "No Parking—Tow Away Zone." I have repeatedy asked them to refrain from parking in this area, but to no avail.

7. Defendant's operation continues to disrupt traffic as the messengers are delivering liquor at the same time the collector is trying to collect. Also Defendant's employees must drive out of the tunnel area against oncoming traffic, creating a dangerous and hazardous situation.

8. Defendant's employees have on occasion run through the lanes of traffic trying to divert the cars awaiting delivery of purchases into the right hand scale lane. This causes confusion as other traffic sees both Defendant's employee and tunnel employee directing traffic, often in opposition of each other.

9. As soon as it gets dark, Defendant's employees have a hard time seeing which car is to receive the liquor purchase, causing additional confusion.

10. On several occasions on Sunday, October 13, 1968 liquor purchases were not delivered to customers until after they had paid their toll and entered the tunnel. The purchasers then stopped their cars beyond the toll booth at the tunnel entrance awaiting their liquor purchases while causing a complete block of oncoming traffic. Defendant's employees were required to pass beyond the toll booth in order to deliver liquor to these cars.

/s/ Russell Bouchard,
Traffic Supervisor

Subscribed and sworn to before me this 14th day of October, 1968.

/s/ Charles J. O'Brien
Notary Public, Wayne County, Michigan.
My commission expires 8-24-72.

## ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE AND TEMPORARY RESTRAINING ORDER

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne

(Title and number of case same as on Complaint.)

At a session of said Court held in the City-County Building on the 14th day of October, 1968

Present: Honorable Joseph G. Rashid, Circuit Judge

On reading and filing the Complaint filed in this cause and the affidavits attached thereto and on motion of the attorneys for Plaintiff, it is hereby ordered:

1. That the Defendant be and appear before this Court on the 16th day of October, 1968 at 9:30 o'clock A.M. Eastern Standard Time, and show cause, if any they have, why a temporary injunction should not issue in accordance with Paragraph B of the Prayer of said Complaint.

2. That a true copy of this Order and a copy of the Summons and Complaint in this action be served on Defendant on or before the 14th day of October, 1968.

3. That in the meantime and until the further order of the Court, Defendant Export Liquor Sales, Inc. is temporarily restrained from trespassing in connection with

his liquor sales business on Plaintiff's own property or properties leased to Plaintiff; from interfering with the collection of tolls at Plaintiff's Tunnel; and from causing congestion and traffic hazards on Plaintiff's property and property leased to Plaintiff.

4. This order is issued for the reason that it appears from the Complaint and the attached affidavits that immediate and irreparable harm will come to Plaintiff if the continuing trespass is not enjoined, as confusion and congestion have resulted and will result in a condition extremely dangerous to life and property at the tunnel entrance.

5. Since this temporary restraining order only restrains a continuing trespass as set forth in M.S.A. §27A.-2919, which trespass is itself unlawful, no bond is considered necessary.

6. This order is issued October 14, 1968 at 2:10 o'clock, P.M.

/s/ Joheph G. Rashid
Circuit Judge.

# CERTIORARI DENIED